BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
JOSEPH W. AND EDNA R. VETTER)

For Appellants: Earl R. Elkins, Tax Consultant

For Respondent: Burl D. Lack, Chief Counsel;
James T. Philbin, Junior Counsel

O P I N I O N

This appeal is made pursuant to Section 19059 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claims of Joseph W. and Edna R. Vetter for refunds of personal income tax in the amounts of $63.46 for Appellants jointly for the year 1950, $344.76 for each Appellant for the year 1951 and $245.98 and $324.86 for Appellants jointly for the years 1952 and 1953, respectively.

Appellants purchased a twenty-acre parcel of land in the San Fernando Valley in 1918. They lived on the land and used it for agricultural purposes, primarily as a fruit orchard. In 1947, they constructed an office building on a part of the land and held the building for rental purposes.

In 1948 Appellants accepted an offer from a subdivider for a strip of land on one side of their farm. The subdivider put in a street connecting with two existing highways at the boundaries of Appellants' property and platted twenty-one lots along the street. Appellants retained three of the lots at one end of the street and five at the other end.

In one transaction in 1950, Appellants sold three of the lots which they had retained under the above-described arrangement.

During the year 1951, Appellants sold to a subdivider a strip of land in the center of their original parcel of twenty acres, parallel to and adjoining the strip which they sold in 1948. Again, they retained land at each end of the strip. The subdivider put in a street connecting with the existing highways and divided his land into twenty-six lots. Appellants paid for the materials in the street fronting their land and divided their end pieces into ten lots. The subdivider graded Appellants' lots for them.

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In 1952, Appellants sold one portion of their remaining unsubdivided property and, in another transaction, two of their original lots.

Tn the year 1953, Appellants sold two portions of their unsubdivided land in two transactions. In that year, they also purchased a five-acre tract of land which they have not improved and hold as an investment.

Appellants did no advertising whatever in order to make the sales described above. They hired no realtors and did not themselves hold a realtor's license. The sales resulted from buyers approaching them without solicitation on their part.

Appellant Joseph Vetter has been ill with chronic arthritis since 1946 and has been unable to farm the land himself. During 1951 Appellants arranged for a farmer to care for their orchard and the arrangement was in effect through the remaining years in question. Profitable farming had become increasingly difficult due to disease of the fruit trees and soil infestation. In addition, there was no fence and crop protection was a problem since the land was surrounded by homes.-

Appellants reported their income as follows:

	Gain from sales of real estate	Income reported	
1950	$ 7,980.00	$2,394.00	Capital gain from real estate
		2,694.54	Rental income
		237.87	Loss
		$4,850.67	Total
1951	$36,319.93	$10,895.98	Capital gain from real estate
		3,105.06	Rental income
		208.60	Interest
		$14,209.64	Total
1952	$22,299.86	$ 6,689.96	Capital gain from real estate
		1,889.17	Rental income
		535.83	Interest
		$ 9,114.96	Total
1953	$25,223.95	$ 7,567.19	Capital gain from real estate
		1,546.15	Rental income
		1,113.95	Interest
		$10,227.29	Total

Respondent contends that the gains from the sales of real property should be treated as ordinary income on the ground that the property was held "primarily for sale to customers in

the ordinary course of . . . trade or business" within the meaning of Section 17711 (now 18161) of the Revenue and Taxation Code. Appellants urge that the quoted language is not applicable here and that their gains are entitled to be treated as capital gains.

Section 17711 was substantially the same as Section 117(a)(l) of the United States Internal Revenue Code of 1939. As stated by the Federal courts, some of the factors to be considered in determining whether property is held for sale in the ordinary course of business are the purpose for which the property was acquired, the activity of the taxpayer and his agents with respect thereto, the making of improvements to the property, conducting a sales campaign, the frequency and continuity of sales and any other factors reasonably tending to show that the transactions were in furtherance of liquidation or in the course of the taxpayer's occupation or business. (Gudgel v. Commissioner, 273 F. 2d 206; W. T. Thrift, Sr., 15 T. C. 366.)

The conclusion in each case must ultimately rest upon the particular facts involved, We are greatly assisted in this matter, however, by several recent decisions by Federal courts on facts strikingly similar in all respects to those which concern us. (Estate of Barrios v. Commissioner, 265 F. 2d 517; Gudgel v. Commissioner, 273 F. 2d 206; Berberovich v. Menninger, 147 F. Supp. 890; Alex M. Massabni, et al., T.C. Memo., Dkt. Nos. 64171-64173, March 31, 1959. See also, Lazarus, v. United States, 172 F. Supp. 421.) Each of those cases involved land which had been held for agricultural purposes for a number of years and was then subdivided and sold, with a degree of sales effort, number of sales and amounts of gain therefrom approximating or exceeding those in this matter. The courts there held that the gain to the taxpayers was capital gain rather than ordinary income.

In considering this case as a whole, the lack of sales activity and the small number of sales, six during the four years in question, are especially notable. Looking upon all of the facts in the light of the above decisions, we conclude that Appellants derived capital gain and not ordinary income from the sales of their land.

O R D E R

Pursuant to the views expressed in the Opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 19060 of the Revenue and Taxation Code that the action of

the Franchise Tax Board in denying the claims of Joseph W. and Edna R. Vetter for refunds of personal income tax in the amounts of $63.46 for Appellants jointly for the year 1950, $344.76 for each Appellant for the year 1951 and $245.98 and $324.86 for Appellants jointly for the years 1952 and 1953, respectively, be and the same is hereby reversed.

Done at Sacramento, California, this 4th day of April, 1961, by the State Board of Equalization.

John W. Lynch, Chairman

Paul R. Leake, Member

Geo. R. Reilly, Member

_____, Member

_____, Member

ATTEST: Dixwell L. Pierce, Secretary